UNIFORMITY OF LAW IN THE SEVERAL STATES AS AN AMERICAN IDEAL.[1]

II. — STATUTE LAW.

OTHER decisions might be cited which, like Lawrence *v.* Fox, have led to uncertainty and confusion in the common law and created a need for legislation as the only available means of restoring consistency and certainty. Without stopping to multiply such instances, I will proceed at once to the consideration of statute law, and its probable effect upon uniformity of law in the several states.

If it were necessary to consider the entire body of statute law, the problem would certainly be discouraging.[2] A striking fact, however, in connection with statutes is that a large proportion of them relate to administrative law; that is, the body of law regulating the administration of the government through boards, commissions, or public officers. Under the same head belong all statutes relating to local administration through the agency of cities and towns. Although the legislatures have an undoubted right, subject to any limitations imposed by the state and national constitutions, to enact laws modifying the entire body of private law, including common law and equity, the use of this right in the past has been moderate. The great bulk of the private law of the country has been left by the legislatures to be declared by the courts. In England "nine-tenths of each annual volume of statutes are concerned with what may be called administrative law; and an analysis of the general acts during the last four centuries would probably show a similar proportion. On the other hand, at least nine-tenths of the leading rules which make up the law of contract and tort are common law, and their origin and development are to be found in the pages of the Year Books and Law Reports, and not of the statute book."[3] Savigny in Germany

[1] Continued from 21 HARV. L. REV. 430.

[2] "The number of legislative enactments passed in the states in a single year has exceeded fourteen thousand, covering in printed form some twenty to twenty-five thousand pages. During the five years from 1899 to 1904 the total number of acts passed by American legislatures was 45,552." Reinsch, Am. Legislatures, 300.

[3] Ilbert, Leg. Methods, 6, 209.

drew a distinction between the province of statute or positive law and that of jurisprudence which seems to correspond roughly with that adopted by Parliament as separating the field of common law and equity from that of statute law.[1] In the United States administrative law forms a large part of the entire body of statute law, as may be seen by reference to the general laws of any state. In Massachusetts, for example, of the two hundred and twenty-seven chapters which compose the Revised Laws of 1902, one hundred and twenty-six chapters are set apart under the heading "Of the Administration of the Government."

It should be noted also that the current of opinion in favor of collectivism, as it is called, or socialism, which is now running strong, if it is not actually dominant, tends to increase the amount of administrative law in the states. In 1901 the commissioners appointed to revise and consolidate the statutes of Massachusetts since 1882, stated that in the revision as reported by them, seventeen new titles were included, which had never appeared in any revision of Massachusetts laws. Out of those seventeen titles, seven bear evidence of the tendency of the state government upon various grounds to extend its activity, by doing itself work which previously had been left to cities and towns, by supervising and regulating professions and business which had previously been left without public supervision, and by authorizing cities and towns to carry on as public utilities work which previously had been left wholly to private enterprise.[2] All these activities rest more or less upon the fundamental assumption of collectivism — faith in the benefit to be derived from state intervention.[3] Other statutes of the same class will be found under the headings Of the Regulation of Trade, the Police Power, and the Employment of Labor. These new activities of the state require an increase of administrative machinery in the form of boards, commissions, or other public officers, and engage more and more the attention of legislatures, leaving to them less time for legislation affecting private law.[4]

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[1] Savigny, Vocation of our Age for Legislation and Jurisp., Hayward's translation, 32 *et seq.*; 2 Pol. Sci. Quar. 119, 124, n. 2. See also 3 Pol. Sci. Quar. 136.

[2] Report of Commissioners, iv. The seven chapters are: c. 28, Of Public Parks and Playgrounds; c. 34, Of the Manufacture and Distribution of Electricity by Cities and Towns; c. 47, Of State Highways; c. 76, Of the Registration of Physicians, Surgeons, Pharmacists and Dentists; c. 83, Of the Protection of Infants and Care of Pauper Children; c. 84, Of the State Board of Charity; c. 88, Of the Massachusetts State Sanatorium.

[3] Dicey, Law and Opinion, 258.

[4] *Ibid.* 305, and n. 2.

For the purpose of considering statute law in relation to uniformity of law, all statutes relative to administrative law may be laid aside. One of the great advantages of local self-government through the agency of states is that each state may adopt those methods of administration which will secure the best results for its own people. Diversity in administrative law in the several states may be more desirable than uniformity.

In the case of private law, on the other hand, no argument is needed to prove that uniformity is desirable. Among a people as closely bound together as the people of the United States a large measure of uniformity in private law is not only desirable, but practically necessary. By private law is meant (speaking generally, without seeking the accuracy of scientific definition) the rules relating to contract, tort, property, family relations, succession, and inheritance.[1] This has been called "lawyers' law," in contradistinction to statute law.[2] The practical question is, what is the probable effect of legislation on the uniformity of this body of law in the several states?

In order to answer that question intelligently, it is necessary to know what the forces are which induce legislative action. A legislature is analogous to a court, with rules of procedure for the admission and despatch of business. Under the freedom of petition secured by American constitutions the people have practically an unlimited right to approach the legislature with petitions for new laws. In Massachusetts every year about thirteen hundred subjects are presented for legislative action, most of them by petition with an accompanying draft of bill. These petitions are of great interest as evidence showing what subjects are engaging the public attention. In most of the petitions only a small number of persons are interested, but a few of them are likely each year to attract the attention of the entire state. In order to be enacted as statutes or resolves each of the petitions must have behind it some power of public opinion or other power sufficient to move the law-making branch of the government to action. For

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[1] The continental codes dealing with substantive private law, as the Code Civil in France, and the Burgerliches Gesetzbuch in Germany, deal with the following subjects, adopting with but little variation the divisions found in the Institute of Gaius: Law of Persons, including Family Law; Law of Things, or Property; Law of Obligations, including Contract and Tort; Succession and Inheritance. This corresponds generally with our system of common law and equity.

[2] "For lawyers' law Parliament has neither time nor taste." Ilbert, Leg. Methods 213.

this reason the annual Acts and Resolves show better than any other record extant what Massachusetts is thinking of and doing. This is true also of the legislation of the other states.

When the legislature is approached by bodies representing a well-formed public opinion, or which create the belief that they represent public opinion, a favorable hearing is almost sure to be granted. No legislature will long defy an aroused public opinion, whether that opinion is based upon reason or sentiment. The real difficulty of a legislator is that upon most of the questions upon which he is required to act there either is no definite public opinion, or it is not ascertainable. The general public are too much occupied with their private affairs to form opinions, or to make their opinions known, on the multitude of questions before the legislature. Persons having a private and special interest in proposed measures, or mere theorists, with no solid foundation for their petitions, by importuning legislative committees, often produce a belief that legislation is demanded by public opinion, for which there is in fact no real public support. As a general rule there is no public opinion in regard to proposed legislation affecting common law or equity. There will never be an uprising of the people either for or against the rule established in Lawrence *v.* Fox. Whether a third person shall be allowed to bring suit upon a contract made for his benefit is a question requiring technical knowledge for its solution, and is of interest only to the parties, and to lawyers, judges, and persons especially interested in the administration of justice and in the safe and symmetrical development of the common law. There is a professional or expert opinion upon the subject, but for most purposes what is called public opinion is a negligible quantity in relation to statutory changes in private law.

There is, however, a notable exception to this rule. Questions of private law which affect social or public interests as distinct from individual interests, such as the relation of employers and employees, or the right of association or combination, questions which touch moral, religious, or other sentiments, such as may arise in the criminal law or in the law of marriage and divorce or on the observance of the Lord's Day, involve a political or social element, and may at any time arouse public discussion which will result in general public opinion that may demand or oppose legislation. It is upon questions of this nature that legislation changing the rules of the common law has been most active. In England within twenty-five

years and in Massachusetts within fifty years the common law unity of husband and wife, and all the rules resulting from that unity, have been swept away by statute, almost completely.[1]

Upon questions of private law which involve a political or moral element, and which attract public attention, every individual is free to petition for legislation; but upon those questions of private law which are wholly technical only experts are likely to petition for legislation, and there are some experts who are not free to petition. This results from the doctrine of the separation of governmental powers.[2]

First, in regard to the executive. In England the executive government is seated in Parliament, and any member of the government, being also a member of the House of Commons or of the House of Lords, can introduce a bill providing for legislative changes in the common law, with the support of the cabinet behind it.[3] Under the American system, both in the state and federal governments, the executive may recommend changes by message, but cannot introduce a bill. A message from the executive is referred to the proper legislative committee, and when so referred, follows the usual routine. The governor cannot with propriety appear before the legislative committee, even if he can do so legally, for the doctrine of the separation of powers is regarded as of vital importance by the legislature and rigidly enforced.[4] His power to induce affirmative action by the legislature is not great, except in the case of a governor of unusual tact and ability, and then his power comes from his personal qualities and not from the law.[5] Governors do not often recommend statutory changes in the common law for the reason that such changes require technical knowledge, and are not usually of interest to the general public. On the other hand, the power of the executive to stop such changes

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[1] Dicey, Law and Opinion, 394.

[2] See Massachusetts Bill of Rights, XXX.

[3] Ilbert, Leg. Methods, 213, 222; 1 Bryce, Am. Comm., 3 ed., 93.

[4] The only instance known to me in which an American executive appeared before a legislative committee is that of Governor Butler of Massachusetts, who in 1883 appeared in person before a joint committee in the investigation of the Tewksbury almshouse, and conducted one side of the inquiry.

[5] Professor Reinsch commends the leadership which some able governors have recently secured over legislatures, as "a symptom of a healthy development in our political system." Am. Legislatures, 285. Mr. Bryce says the separation of the executive from the legislative department is not a necessary incident of democratic government, citing the example of England. 2 Am. Comm., 3 ed., 587.

by the use of the veto, which exists in all but two of the states, is very great.[1]

Next, in regard to the judiciary. The judges, either as a body or as individuals, have never had, and are not likely to have, more than a slight influence in effecting legislative changes in private law. No regular method is provided by which the judges may approach the legislature as petitioners for legislation, and they cautiously refrain from any action which may expose them as individuals or the judiciary as a body to criticism for interfering with the legislative branch of the government. Occasionally a judge of extraordinary energy and activity, like Judge Story, may suggest changes in the law and prepare drafts of bills for the use of friends who are members of Congress or of a state legislature. The Crimes Act of 1825,[2] the Bankruptcy Act of 1841,[3] and the Admiralty Jurisdiction Act of 1845,[4] are probably traceable to his influence. It is open, of course, to legislative committees to request information from the judges, but this power is not often used. Practically under our system the whole benefit which might be obtained from the judiciary as an expert body in effecting changes in private law and improvements in the organization of the courts and the administration of public justice is lost to the legislature and to the public.

In England it is far different. "The earliest Acts of Parliament were drawn by one or more of the king's judges."[5] After the Restoration the judges attended the sittings of the House of Lords and were occasionally employed to draft bills. Again the Lord Chief Justice and other eminent judges have for a long time had seats in the House of Lords, not *ex officio*, but as peers of the realm, with the right as members to introduce bills. To this fact may be traced many valuable acts reforming and improving the common law, such as Lord Denman's Act,[6] abolishing incompetency of witnesses in civil actions from interest or from previous conviction of crime; Lord Campbell's Act,[7] giving a remedy in damages for causing death by wrongful act, and many others. In Massachusetts a judge by accepting a seat in the legislature vacates his judicial office, under

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[1] North Carolina and Rhode Island. See 1 Am. Pol. Sci. Rev. 200, 204. A governor of New York has twice prevented the enactment of the Field Civil Code by means of the veto, after it had passed both branches of the legislature.

[2] 1 Story, Life and Letters, 439.

[3] 2 *ibid.* 407.

[4] Jackson *v.* The Magnolia, 20 How. (U. S.) 296, 342, per Campbell, J. (1858).

[5] Ilbert, Leg. Methods, 77, 78.

[6] 6 & 7 Vict., c. 85 (1843).

[7] 9 & 10 Vict., c. 93 (1846).

the eighth article of amendment to the constitution.[1] Finally, the Judicature Act of 1873[2] in section seventy-five provides for a council of judges of the Supreme Court to be held at least once a year, with a duty to report to the government what amendments or alterations it would be expedient to make, for the better administration of justice. A similar provision might be useful in the United States.

While the influence of the judges is likely to be small in legislation affecting the common law, that of the legal profession has been and is likely to be very great. The influence of the bar may be exerted in many ways. In the first place, the bar has unlimited right to petition for legislation. Again, every legislature has a judiciary committee composed wholly or almost wholly of lawyers, and the report of a judiciary committee upon a legal subject is usually of great weight. Sometimes individual members of the legislature who are lawyers acquire leadership and influence of controlling importance. A remarkable instance of such influence is the case of Stephen J. Field, brother of David Dudley Field. In 1848 Stephen J. Field removed from New York to California. As a member of the judiciary committee of the first legislative assembly of that state, he exercised a controlling influence over its legislation, and thus secured for the Field codes the beginning of their career in the West.[3] Finally, lawyers may appear as counsel before legislative committees and a powerful argument before a legislative committee may often be more momentous to the common law than an argument before a learned court.

The power of the bar over legislation affecting the common law is in reality the power of expert opinion. Very few important statutes originate in the legislature.[4] As a rule, they are prepared by commissions specially appointed to investigate and report upon a subject. Sometimes they are prepared by an administrative board, sometimes by private petitioners, who have expert knowledge upon the subject of the petition. Legislation affecting the common law always requires technical knowledge, and the work of legislative committees in the case of any important statute upon that subject will consist principally in hearing arguments for or

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[1] Com. *v.* Hawkes, 123 Mass. 525 (1877).

[2] 36 & 37 Vict., c. 66.

[3] Preface to Revised Codes of North Dakota, 1895, 18. Mr. Field was afterwards a justice of the Supreme Court of California, and later of the Supreme Court of the United States.

[4] Reinsch, Am. Legislatures, 275.

against bills prepared outside the legislature, and in suggesting alterations and amendments.[1] The responsibility of deciding for or against proposed legislation remains with legislative committees and the legislatures, but their tendency is to be guided on technical subjects by expert opinion. Except for the small but influential body of teachers of law, whose influence is just beginning to be felt practically upon legislation and other matters pertaining to the law, the only body of expert opinion available for the legislature upon legislation affecting uniformity of law is that of the bar. If the bar is united and active for or against a proposed measure of that character, its opinion in most cases will be controlling.

The powerful influence of the bar on legislation affecting the common law is a fact which tends to secure uniformity in such legislation. Another important fact in favor of uniformity is the legislative tendency to follow precedents, and to adopt or copy the statutes of other legislatures. It is true that the doctrine of precedents as applied in common law courts has no application in a legislative body. Each successive legislature in a state is free to act as it pleases, except as restrained by the constitution. It is also true, however, that legislatures are much influenced by their own former action, and the action of their predecessors. Any lawyer who has had experience in a legislative body must have been struck by this phenomenon. It exists in the English Parliament,[2] and in the continental law courts,[3] though the very important doctrine that precedents are of binding quality remains a peculiarity of the common law.

More important than the tendency of legislatures to follow their own precedents is the ease and readiness with which they adopt and enact the work of other legislatures. A striking example is the Statute of Frauds, enacted in 1677 in England, and adopted in nearly all of the United States. Another example is the Employers' Liability Act, enacted in England in 1880, and adopted

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[1] In Massachusetts within the past twenty years the following important statutes were drafted outside the legislature, nearly all of them by commissions: Employers' Liability Act, 1887, c. 270; Metropolitan Sewerage Act, 1889, c. 439; Metropolitan Park Act, 1893, c. 407; Metropolitan Water Act, 1895, c. 488; Negotiable Instruments Act, 1898, c. 533; Land Registration Act, 1898, c. 562; Street Railway Act, 1898, c. 578; Act to Simplify Criminal Pleadings, 1899, c. 409; Act Relative to Business Corporations, 1903, c. 437; Insurance Act, 1907, c. 576; Warehouse Receipts Act, 1907, c. 582.

[2] Dicey, Law and Opinion, 46 and 368, n. 1.

[3] 19 Green Bag 460; Dicey, Law and Opinion, 485.

with little alteration in Massachusetts in 1887. The most striking exhibition of this tendency is the spread of the Field Code of Procedure. It was enacted in 1848 in New York. Within five years similar codes were enacted in Missouri, California, Iowa, Kentucky, Minnesota, Indiana, and Ohio. Within twenty-five years the Field Code had been enacted in substance and often in its very letter by sixteen other American commonwealths.[1] In 1897 this procedure was in force in twenty-seven states and territories. The wide and rapid spread of the Code of Procedure indicates, no doubt, a deep dissatisfaction with the pleading and practice previously in force, but it also illustrates the boldness and readiness with which the legislature of one state will adopt an important statute which comes to it indorsed by the approval of the legislatures of other states. The Field Civil Code, on the other hand, which deals with substantive private law, has had no such success. It was adopted by Dakota in 1865, without revision by a commission, with such modifications only as were suggested by legislative committees.[2] That code was adopted also in California in 1872. Georgia has a Civil Code adopted in 1860; but the movement for general codification of the substantive civil law has never made much progress in the United States.

On the other hand codification of different parts of the substantive commercial law is now going on with a rapidity which resembles that of the Field Code of Procedure. A uniform Negotiable Instruments Act has been enacted in thirty-five states and territories and the District of Columbia; a uniform Warehouse Receipt Act in nine states; a uniform Sales Act in one territory and three states; and bills are in preparation for uniform laws on Bills of Lading, Certificates of Stock, and Partnership.[3]

In addition to the natural demand for uniformity in commercial law two powerful agencies have assisted this movement in favor of partial codification of commercial law. One is the American Bar Association, organized in 1878, and having as one of its objects the promotion of uniformity of legislation throughout the Union. The other is the National Conference of Commissioners on Uniform State Laws, which meets annually at the same time and place

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[1] Hepburn, Hist. Development of Code Pleading, 87 *et seq.*, 114.

[2] Revised Codes of North Dakota, 1895, Preface, v.

[3] In England three similar codifying measures have been enacted: the Partnership Act, 1890, drawn by Sir Frederick Pollock; the Bills of Exchange Act, 1882, and the Sale of Goods Act, 1893, both drawn by Mr. M. D. Chalmers.

as the American Bar Association. The Conference is made up of commissioners appointed by different states, and thirty-nine states and territories and the District of Columbia now have such commissioners.[1] The combined influence of these two bodies, with the influence of the Association of American Law Schools, which also meets annually at the same time and place, is a force of the first importance in securing uniformity of legislation in the states. In conclusion, as the result of this examination of the method in which legislative bodies do their work, and of the forces which govern their action, it is plain that uniformity of private law is more easily and surely attainable from the action of legislatures than from the action of the courts. The corrective action of the courts, when once a diversity in case law appears among the several states is slow and uncertain, while that of the legislatures is prompt and sure. The courts are obliged to wait until some case is presented for decision in the ordinary course of litigation before they can act. The action of the legislature may be invoked at any time. It does not follow, however, from these considerations, that the friends of uniformity of law should favor the enactment of statutes or codes which invade the province of case law. A comparison of the merits and defects of the two systems must first be made.

III. — Case Law versus Statute Law.

It is an historical fact that the legislature has for centuries left a large portion of the private law to be declared by the courts. A sound legislator, whenever legislation is demanded which amends or abolishes a rule of case law or which codifies case law and puts it in the form of a statute, will require the petitioner to show cause why he should vote in favor of such demand.

1. The courts in litigated cases, by the examination and cross-examination of witnesses under oath, have better means of discovering the facts than are available in a legislative hearing. The facts proved in court arise directly from the life and transactions of the people, and rules made by experienced judges with direct regard to those facts are more likely to be just and adapted to each case than general rules framed by statute upon such statements of fact as are usually made before legislative committees.

2. The courts have the benefit of the assistance of counsel in

[1] See Proceedings of Seventeenth Annual Conference and Address of Pres. Amasa M. Eaton, Portland, 1907.

declaring the law, and the safeguard of criticism by an expert body of professional opinion. This was an efficient protection against arbitrary action on the part of the Roman praetor,[1] and it is an efficient protection against arbitrary action by a common law court.[2]

3. The judges are required to state the reasons for their decisions under their own names. Responsibility for case law is fixed and definite, while in the case of legislation, under the committee system, there is a great want of definite responsibility.[3]

4. Case law is based upon principle, has historical continuity, and aims at logical symmetry and consistency in all its parts. Statutes also, in all legislation worthy of the name, are based upon principle. As a rule, however, each statute stands by itself, upon its own *ratio legis*. To a lawyer the relation between statute law and common or case law may be likened to the relation between a dictionary of the English language and a masterpiece of English literature; for example, Paradise Lost. Each work may be conceded to be invaluable. Each word in the dictionary stands by itself, and all the words when read together convey no connected meaning to the ordinary mind.

5. The legislature is more closely in touch with the electorate, or political sovereign, than the courts. While this fact has great advantages, it has some disadvantages. The legislature can enact promptly in a statute the deliberate public opinion of the electorate, but it is also in danger of mistaking mere temporary emotion for deliberate public opinion. Not every current of public feeling which passes over a community is worthy to be enacted into law. It is an advantage to the community that case law develops slowly. It is controlled by reason, and protected against gusts of passion or sentiment by the method of its growth.

6. Case law is useful as a basis for legislation when the principle of the cases has been developed to its full extent, and the needs of the community require a modification of the principle, or the introduction of new rules based upon new principles. Thus the legislature both in England and in the United States in dealing with the property rights of married women had the benefit of the rules worked out during centuries in the courts of law and equity. So in the law of master and servant, the mass of litigation over the

[1] Moyle, Inst., 1 ed., Introduction, 31.

[2] United States *v.* Hudson, 7 Cranch (U. S.) 32, per Johnson, J. (1812).

[3] 4 Proceedings Am. Pol. Sci. Ass'n, 71 *et seq.*

rule in Farwell *v.* Boston & Worcester R. R.[1] is of great value to the legislature as a basis for legislation modifying the rule to meet new conditions. In like manner, if the law relating to the right of association or combination should be promulgated in the form of a statute, the legislature would derive great aid from the efforts of the courts to declare the law in accordance with common law principles. The community, in short, is better served when private or case law is left to the courts, and legislation is confined to administrative law, and to dealing with new political or economic or social conditions which common law or equity cannot meet.

Legislation affecting the common or private law may be divided into two classes. The first is when diversity of decision has arisen among the several states upon subjects in which uniformity is desirable. In such cases the object of legislation is to restore uniformity by stating the principles of the common law correctly in the form of a statute. In regard to such statute, as shown above, it is comparatively easy to obtain the favorable action of many legislatures, and to secure uniformity. The greater difficulty is to preserve uniformity. It is, of course, of fundamental importance that such statutes should, to begin with, be well drawn; but however well drawn they may be, they are exposed to two dangers: amendments in the state legislatures, and diverse interpretations by the courts of different states. The best protection of the Negotiable Instruments Act and of all other uniform statutes against both of these dangers is the same — the faithful study of the great cases expounding the principles of the common law, commercial law, or whatever the subject in hand may be, and the logical application of those principles by counsel and courts in their daily work to all concrete cases. The way to preserve the benefit of uniform statutes is the same as the way to escape from the danger of the multitude of precedents; that is, a reliance upon original reasoning based upon the true principles of the common law. If the law schools of the country, which now have practical control of legal education, send to the bar lawyers who are thoroughly grounded in the systems of common law and equity as contained in the leading cases in England and America, the uniformity and consistency of the law will be preserved, whether the law is stated in the form of cases or of statutes. Such lawyers will be a powerful influence with the courts against diversity of rules both in case law and in

[1] 4 Met. (Mass.) 49.

the construction of statutes. In the legislatures of the country they will stand against petty and needless amendments to statutes. The want of this influence has had much to do with the dissatisfaction which now seems to exist with the working of codes of procedure in the so-called code states.[1] Returning for a moment to Lawrence *v.* Fox, the greatest evil of such a decision is not that it creates a need for invoking the aid of the legislature, but that it unsettles the science of law. It breaks the continuity of legal development. Resting upon no common law principle, it brings confusion and uncertainty to other common law principles. Every principle or rule in the law which has been relied upon to support Lawrence *v.* Fox has been made the subject of more or less looseness of thought and expression as a result; *e. g.*, agency, trust, novation, subrogation, gift. In the absence of a principle, counsel cannot predict with confidence under what circumstances a third person can maintain an action upon a contract for his benefit. He must find a case exactly similar in its facts to that of his client.[2] The effect is to substitute for the science of law the science of cases — rules for obtaining quickly and thoroughly all cases just like the one in hand — and in time to destroy the faculty of applying legal principles boldly and accurately to new combinations of concrete facts.

The other class of legislation affecting private law is where the legislature for reasons of policy enacts laws which aim not merely to state accurately or codify the common law, but to modify the common law; or laws which introduce new principles or rules having no connection with the common law. These may be called statutes in the strict sense — not declaratory acts, but commands, making new law. *Lex est quod populus jubet atque constituit.*[3] The

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[1] "The Bar Association has also set on foot a movement to revise that legal monstrosity known as the Code of Civil Procedure, but whether good or ill will be accomplished by the result, none of us, I take it, care to predict at the present moment. . . . Certain it is that we will not be able to get any code that is satisfactory to anybody so long as each individual member of the legislature finds it necessary to have passed two or three separate amendments to relieve constituents who are embarrassed by present litigation." 24 Reports, N. Y. State Bar Association, 294. See Hepburn, Hist. Development of Code Pleading, Introduction, xi.

[2] For the condition of the law in regard to the right of third persons under a contract between a water company and a city or town by which the company agrees to supply the inhabitants of the city or town with water, see 3 Mich. L. Rev. 501; 4 *ibid.* 540; 5 *ibid.* 362; Guardian Trust, etc., Co. *v.* Fisher, 200 U. S. 57; Pond *v.* New Rochelle Water Co., 183 N. Y. 330.

[3] Gaius, I, 1, § 2.

office of the courts in regard to this class of legislation is wholly that of interpretation. In the multitude of statutes which the legislatures are now putting forth there are many which belong to this class, and the function of the courts as interpreters of written laws seems likely to be more conspicuous in the future than it has been in the past. This involves no diminution of dignity or power in the judiciary, nor does the work of interpretation require less knowledge of legal science than the work of declaring the principles of common law and equity. It is in the field of interpretation that judicial genius has won its greatest triumphs. The whole body of constitutional decisions consists of the interpretation of documents framed and ordained by the people. The whole body of patent law is practically the construction or interpretation of a statute by the courts.

When a statute modifies the common law, as for example the Employers' Liability Act, in order to interpret it and apply it soundly it is necessary to know what the common law rule was before the statute and also to discover and enforce the meaning of the legislator as expressed in the statute. This two-fold office is often extremely difficult, and is made more difficult when the legislator on his part does not thoroughly understand the rule which the statute modifies. Thus, there is reason to fear that the Massachusetts legislature did not fully understand the common law duties of employers in passing the Employers' Liability Act,[1] and Professor Dicey hints that Parliament, or some of the lawyers by whom Parliament was guided, did not fully understand the principles of equity which they meant to follow in enacting the Married Women's Property Acts.[2] It is probably true that lawyers and judges are in danger of being biased by professional habits and feeling in construing statutes which conflict with common law or equity, or which rest upon new views of economic or social policy. Such danger exists also among scientific jurists on the Continent.[3] It can fairly be affirmed, however, that English and American judges have risen above this bias in the performance of their offi-

[1] Ryalls *v.* Mechanics Mills, 150 Mass. 190, 195 (1889).

[2] Dicey, Law and Opinion, 395.

[3] *Cf.* the strong expression of Savigny in regard to the *Lex Julia et Papia Poppaea*, A. D. 9. This law was aimed by Augustus at the evil of childlessness, and affected the Roman law of inheritance and other parts of the Roman private law for centuries. Savigny says: "That enactments of this kind easily become a baneful corruption of the law, and that they should be most sparingly employed, must strike any one who consults history." Vocation of Our Age for Legislation, Hayward's translation, 32.

cial duty and have honestly enforced the law. In England, where the judges are appointed during good behavior, a leading writer says: "But the action of the courts is to be judged in the light, not of a few petulant or captious criticisms by individual judges, but of their general course of conduct; and they have as a rule loyally adhered to their function of being not critics of the legislature, but interpreters of the law."[1] In the United States, where the judges are elected directly by the people in all but eleven states,[2] there is no practical danger of want of judicial sympathy with new legislation, whether simply modifying the common law, or based upon new economic or social theories and introducing rules unknown to the common law.[3] In the field of interpretation, as elsewhere, the best guide to sound and just results is a profound knowledge of the principles of the common law.

The quality of the law depends at last upon the quality of the work done in making and declaring it. The responsibility for case law rests primarily upon the judges; for statute law upon the legislatures; but the influence of the bar upon both forms of law, as I have endeavored to show, is a factor of vast importance. An American bar inspired with a love for the common law, and well grounded in its principles, is a force more essential to the uniformity of law in the United States and to a sound development of the law than the enactment of uniform statutes or codes. It is also more difficult to obtain. To produce and maintain such a bar requires long co-operation by all the law schools of the country upon a general plan of education and the steady leadership of the courts in adhering to sound principle even when opposed to precedents.

It is, of course, too late to seek to restore unity in detail between the common law of England and that of America, but it would certainly be useful and instructive if some scholar would collect the cases in which American courts have departed from English rules, and show what good or evil has come from the diversity. Was it a great gain for the law when Lawrence *v.* Fox was decided in New York, or when Nichols *v.* Eaton was decided at Washing-

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[1] Ilbert, Leg. Methods, 7.

[2] 1 Am. Pol. Sci. Rev. 205.

[3] See Municipal Control of Public Utilities, . . . a study of the attitude of our courts toward an increase of the sphere of municipal activity, in 25 Columbia University Studies in History, etc. The author concludes "that the attitude of our courts favors a decided increase in the sphere of municipal activity." P. 110.

ton?[1] The same judge who wrote the opinion in Nichols *v.* Eaton also wrote the opinion in Lovejoy *v.* Murray,[2] a case which has been admired as an example of independence and original power; but would not the opinion have been a stronger opinion if the sources of the common law as now brought to light by legal scholars could have been explored?[3] Parker *v.* Foote,[4] which refused to recognize the English easement of light as unsuited to the growing cities and towns of this country, was probably decided wisely, but in view of present conditions it seems that something may be said upon the other side.[5] Again, in respect to procedure, which reacts powerfully upon substantive law, has America done wisely in departing so soon and so radically from the common law? There was no doubt need for reform, but was there any real need for haste?[6] The reformed code procedure, its friends assert,[7] has been adopted in substance in England. If so, it will be well for American as well as English lawyers to reflect upon some words of warning from Bishop Stubbs. Referring to the Judicature Act, he says:

"It yet remains to be seen whether this amended system, easier and less intricate than the old, supplies as good material for training or provides as sound schools of lawyers. It is no doubt philosophically more capable of perfection. The lore of Coke and Selden, like the lore of Elden and Stowell, is for the present at a discount. Of course, looking on all this with a historical eye, one is apt to be a little disconsolate; but time will avenge them, and the neo-legal jurisprudence will soon have an array of reports and decisions that will outweigh, physically at least, the Year Books and Institutes."[8]

Amid the rush of precedents and statutes it is well to pause and study the foundations upon which the law really rests. The great

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[1] 91 U. S. 716 (1875).

[2] 3 Wall. (U. S.) 1 (1865).

[3] See Professor Maitland in 1 L. Quar. Rev. 324 and 2 *ibid.* 481; and Dean Ames in 3 HARV. L. REV. 326, the Disseizin of Chattels.

[4] 19 Wend. (N. Y.) 318 (1838).

[5] "The enormous height of American buildings, which has caused them to be nicknamed 'sky-scrapers,' is evidently one consequence of there being no easement of light to check their upward growth." 7 J. of Comp. Jurisp. 308.

[6] "The official draft of the New York code, framed and filled in, as we have seen, with astonishing rapidity, was passed into an operating law no less quickly." Hepburn, Hist. Development Code Pleading, 87.

[7] David Dudley Field in 1 Jur. Rev. 18, 22.

[8] Lectures on Medieval and Modern History, Canon Law in England, 381.

lawyers who guided the American Revolution, framed the federal Constitution and the Judiciary Act and the constitutions of the original states, were trained in the common law and equity system of England. Their successors will make no mistake in following their example. Parliament in recent years has made great inroads by statute upon common law and equity, and the current English law reports are not so useful to American lawyers as English reports formerly were; but the ancient principles of law and equity in both English and American reports are as valuable as ever for discipline and for use. In the hands of a bench and bar trained from youth in those principles, cases and statutes, however numerous, whether the work in hand be the common law or the construction of statutes, will be simply the materials of a new jurisprudence that will surpass the old.

One further topic must be considered briefly — the relation between the state and the federal courts — in order to obtain a complete view of the subject of uniformity of law.

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[*To be continued.*]